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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re M.S., a Person Coming Under the  
Juvenile Court Law.

SOLANO COUNTY DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ERIC S.,

Defendant and Appellant.

A147448

(Solano County  
Super. Ct. No. J43115)

Eric S. (father) appeals from a jurisdictional and dispositional order removing M.S. (minor) from mother's care pursuant to Welfare and Institutions Code section 361, subdivision (c)(1). Father contends the court erred in finding, as to him, that there is a substantial probability of danger to the minor if the minor were returned home, contending that the finding was unnecessary and inappropriate because father did not have physical custody of the minor or seek placement. We will affirm the order.

**I. FACTS AND PROCEDURAL HISTORY**

**A. Dependency Petition**

Respondent Solano County Department of Health and Social Services (Department) filed a juvenile dependency petition and detention report with respect to the minor and a half-

sibling on August 12, 2015.<sup>1</sup> Under subdivision (b) of section 300, the Department alleged that mother neglected the minor and his half-sibling and was unable or unwilling to care for them. Specifically, the petition alleged that the minor walked to a police station on August 10, 2015, seeking help because mother was fighting with an unknown male over a stolen cell phone at a homeless encampment; mother had a history of homelessness that contributed to the children's neglect; and mother's substance abuse and mental health issues rendered her periodically incapable of caring for them. Under subdivision (g) of section 300, the Department alleged that the whereabouts of the children's fathers was unknown and they had not left any provision for support.

#### B. Detention

Mother did not appear for the detention hearing on August 13, 2015. The juvenile court ordered the minor and his half-sibling be detained in foster care and set a jurisdiction and disposition hearing for September 22, 2015.

#### C. Jurisdiction and Disposition Report and Addendum

In its Jurisdiction/Disposition Report filed on September 18, 2015, the Department advised that it had located father at the Solano County Claybank Detention Facility. Father had been arrested on an outstanding warrant relating to a 2010 felony domestic violence case and, in August 2015, was ordered to serve 150 days in jail and 36 months of probation. In December 2013, father had been ordered to serve jail time and 36 months of probation on a misdemeanor drug possession offense. The Department sent father a letter informing him of the dependency proceedings and requesting that he return information concerning the minor's parentage.

The Department recommended that the allegations of the dependency petition be sustained as amended, that mother receive reunification services, and that father be denied reunification services as an alleged (rather than presumed) father.

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<sup>1</sup> The minor was born in December 2005 to mother and father. Mother had given birth to his half-sibling, Cameron, in 2002. Another man fathered Cameron, but father regards Cameron as his own son.

Mother and father did not attend the initial jurisdiction and disposition hearing on September 22, 2015. The hearing was rescheduled for October 13, 2016.

On October 8, 2015, father filed a Statement Regarding Parentage (form JV-505), requested appointment of counsel, asserted his belief that he was the minor's father, and sought a ruling that he was the presumed father. Father claimed that he provided support for the minor between December 2005 to June 2009, held the minor out as his child, and wanted to care for him. He denied the allegations of the dependency petition.

On October 13, 2015, father was appointed counsel, who obtained a continuance of the jurisdiction and disposition hearing to November 3, 2015.

On October 30, 2015, the Department filed an Addendum to the Jurisdiction/Disposition Report, recommending that the court sustain the allegations of the dependency petition as amended, find father to be the presumed father of the minor, and provide reunification services to both parents. Father remained in custody.

In the Addendum report, the Department sought to amend the dependency petition to add allegations under section 300, subdivision (b), that father had a long chronic history of substance abuse, including daily use of methamphetamine until his incarceration in August 2015; his incarceration occurred after he absconded following his termination from an alcohol treatment program; the original charges were associated with a felony domestic violence incident between father and mother; and father's chronic substance abuse, continued criminal involvement, and history of domestic violence placed the minor at risk of serious physical harm or neglect. The Addendum report substantiated these allegations based on an interview with father, in which he admitted that he initiated a physical altercation with mother after he had been drinking, he served six months in jail, he was placed on probation and ordered to attend a drug and alcohol treatment program, he was kicked out of the program, and a warrant was issued. Father admitted continued use of alcohol, marijuana, and methamphetamine, as well as another prior incident of domestic violence with mother. Father also indicated he did not want the minor in the foster care system and wanted to get him into his care and custody.

D. Amendment to Dependency Petition

On November 3, 2015, the juvenile court granted the Department's request to amend the dependency petition and found father to be the minor's presumed father. The contested jurisdiction hearing was rescheduled and then continued from time to time due to father not being removed from custody.

E. Order After Contested Jurisdiction and Disposition Hearing

On January 12, 2016, despite efforts by the county counsel's office to have father transported to the hearing, father declined the transportation and refused to attend. Father's attorney explained that father was concerned he would lose his room and property if he left the facility to appear at the hearing, but that he was interested in family reunification. Father's counsel objected to the Department's jurisdiction and disposition recommendations, but the only specific objection was that father should receive reunification services with respect to the half-sibling as well as the minor.

The juvenile court sustained the amended allegations of the petition against father under subdivision (b) of section 300, as well as several allegations against mother, and found that the minor and Cameron were persons described under section 300, subdivisions (b) and (g).

The court further found that there was clear and convincing evidence of the circumstances stated in section 361, subdivision (c)(1), with regard to both mother and father. The court found that continuance in the home of the parents was contrary to the minor's welfare, removed the minor from mother's physical custody, placed the minor in out of home care, and ordered reunification services for both parents.

This appeal followed.

## II. DISCUSSION

Father contends that the finding of the circumstances set forth in section 361, subdivision (c)(1) should be stricken as to him, because he did not have or seek physical custody and the minor was not living with him at the time the dependency petition was initiated.

### A. Statute

Section 361, subdivision (c) provides: “A dependent child shall not be taken from the *physical custody* of his or her parents . . . *with whom the child resides at the time the petition was initiated*, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive, and, in an Indian child custody proceeding, paragraph (6).” (Italics added.) Paragraph (1) of the subdivision reads in pertinent part: “There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody.” Essentially, father argues that the paragraph (1) finding should never have been reached as to him because the predicate of the subdivision—that he have physical custody and reside with the minor when the dependency petition was filed—was not met.

### B. Forfeiture

The Department counters that father forfeited his right to argue that the court erred in removing the minor, and thus cannot challenge the finding that the circumstances set forth in section 361, subdivision (c)(1) applied to him. The Department notes that father refused to attend the contested jurisdiction and disposition hearing on January 12, 2016, and his appointed counsel did not object specifically to the removal order or the finding that there was clear and convincing evidence of the circumstances stated in section 361, subdivision (c)(1).

Nonetheless, we have discretion to review the legal question of whether the court had authority under section 361, subdivision (c)(1) to make the finding that the circumstances set forth in that section applied to him. (E.g., *In re Dakota J.* (2015) 242 Cal.App.4th 619, 630 (*Dakota J.*)). We turn to the merits of father’s appeal.

### C. Merits

The circumstances set forth in section 361, subdivision (c) are that “[t]here is or would be *substantial danger* to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parents’ or guardians’ physical custody.” (§ 361, subd. (c), italics added.)

Substantial evidence supported the court’s finding that these circumstances applied as to father, based on the evidence that father’s continued criminal involvement, substance abuse, and domestic violence history placed the minor at substantial risk of physical harm or neglect. Essentially, if once again the minor was in father’s care, there would be a substantial danger to the minor’s safety and welfare.

The question, however, is whether the juvenile court had statutory authority to reach this finding, since the minor did not live with father at the time the petition was filed.

In this regard, father relies on *Dakota J.*, *supra*, 242 Cal.App.4th 619. There, the mother had one daughter in her physical custody and two sons who were not in her physical custody, either when the dependency petition was filed or for several years prior. (*Id.* at p. 623.) The juvenile court found there would be a substantial danger to the children’s physical health, safety, protection, and physical and emotional well-being if they were returned to mother and entered a dispositional order removing all three children from her physical custody and ordering suitable placement. (*Id.* at pp. 627.) The appellate court concluded that section 361, subdivision (c) “does not contemplate that a child could be removed from a parent who is not living with the child at the relevant time” (except under subdivision (c)(5), which neither the trial court in *Dakota J.* nor the trial court in this case cited as a basis for removal). (*Id.* at p. 628 & fn. 6.)<sup>2</sup> It was therefore error to order the sons removed from mother’s physical custody

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<sup>2</sup> Section 361, subdivision (c)(5) provides that a dependent child may be removed from the physical custody of his parents with whom the child resides at the time the petition was initiated where “a parent who has been incarcerated or institutionalized cannot arrange for the care of the minor.” Although father in this case was incarcerated at the time of disposition, the minor was not living with him when the petition was initiated. The parties do not contend that subdivision (c)(5) applies here.

under section 361, subdivision (c), since they were not residing with mother when the petition was initiated or for the prior five years. (*Id.* at pp. 629–630.) By way of disposition, the court stated: “The portion of the court’s dispositional order removing [the sons] from mother’s physical custody under section 361, subdivision (c)(1), is reversed. [¶] Although we reverse the dispositional order because it is based on an improper application of section 361, subdivision (c), nothing in this opinion should be construed to restrict the court’s authority on remand to make a new dispositional order applying any applicable statute or rule.” (*Id.* at p. 632.)

The case before us is different than *Dakota J.*, however. Here, the court did not order *removal* from father, but only from mother, with whom the minor resided when the petition was filed. Thus, father has not established that there is anything wrong with the juvenile court’s order of removal. His only concern is that there is a *finding* as to father that the minor would be in “substantial danger” if returned to him.

Father provides no authority for the proposition that the juvenile court cannot make a “substantial danger” finding under section 361, subdivision (c)(1) as to father (as well as mother) when appropriately removing the child from mother’s custody. Moreover, father fails to establish that any such error is prejudicial.

Father contends the finding was harmful to him because parental rights can be terminated based on a finding of detriment made by clear and convincing evidence in conjunction with a removal order. For this proposition, he cites *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829 (*Marquis D.*).

*Marquis D.* is inapposite, however, since it did not address the significance of a finding of “substantial danger” in conjunction with a removal order under section 361, subdivision (c)(1). Instead, it concluded that a finding of “detriment” under section 361.2 as to placement with a non-custodial parent had to be made by clear and convincing evidence, noting that termination of parental rights may be based on detriment findings made at an earlier *review* hearing. (*Marquis D.*, *supra*, 38 Cal.App.4th at p. 1829; see *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256 (*Cynthia D.*); § 366.26.)

Father's concerns that the finding under section 361, subdivision (c)(1) could be used to terminate his parental rights is misplaced. Section 366.26, subdivision (c) provides that findings " 'pursuant to *Section 366.21 or Section 366.22* that a minor cannot or should not be returned to his or her parent or guardian, shall then constitute a sufficient basis for termination of parental rights unless the court finds that termination would be detrimental to the minor.' " Sections 366.21 and 366.22 pertain to six-month, 12-month, and 18-month *review* proceedings. Thus, while section 366.26 authorizes the use of *detriment* findings from *review* proceedings in terminating parental rights, there is no provision in section 366.26 that a "substantial danger" finding under section 361, subdivision (c)(1) may be used to terminate parental rights. (See *Cynthia D.*, *supra*, at pp. 249–250, 253.)

Indeed, in the usual course, father will have future opportunities to litigate whether placement or return of the minor to his care and custody would be detrimental to the minor's welfare. If father seeks to have the minor placed with him, one of the issues will be whether the placement would be "detrimental" to the minor. (§ 361.2, subd. (a).) Even if father does not seek placement, his parental rights cannot be terminated without a section 366.26 hearing, and there typically can be no section 366.26 hearing unless reunification services, once ordered, have been terminated at a six-month, 12-month, or 18-month review hearing. At each of those hearings, the court must return the child to the parent unless the Department establishes, among other things, that substantial "detriment" precludes return of the child at that juncture. Because father will likely have new detriment determinations before his parental rights will be terminated, he fails to establish that the finding of "substantial danger" in this case is prejudicial.

We also note that there is no question father had notice and an opportunity to be heard with respect to whether the substantial danger finding under section 361, subdivision (c)(1) should be applied to him. Father, represented by counsel, made no specific objection to the court making this finding at the hearing. As mentioned, the finding was supported by substantial evidence, and even if the finding was unnecessary to the determination that the



minor be removed from mother's physical custody, father has not shown that the finding prejudices him. Father therefore fails to establish reversible error.<sup>3</sup>

### III. DISPOSITION

The order is affirmed.

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<sup>3</sup> Father notes in passing that, at the dispositional hearing, he did not request that the minor be placed with him, and that if he had, the juvenile court would have been required to conduct an analysis under section 361.2, subdivision (a), which provides for placement of a child with a non-custodial parent who requests custody unless the placement would be detrimental to the child. The Department notes a split of authority as to whether section 361.2 can be invoked by an "offending" parent, and then argues that the evidence supports a finding that father was an offending parent and that placement with him would in any event be detrimental to the minor. Since section 361.2 was not raised at the disposition hearing, we need not and do not address the issue.

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NEEDHAM, J.

We concur.

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JONES, P.J.

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SIMONS, J.

(A147448)